IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL REVISION APPLICATION NO.290 OF 2006

Dr. Mrs Nanki J. Bijlani,)
Age: 71 years, Occ.Doctor (retired),)
R/at 56 B Block, Sukhmani Building,)
Bomanji Petit Road, Near Kemps Corner)
Mumbai 400 026.) ...Applicant

Versus

The State of Maharashtra,)
(At the instance of D.B. Marg Police)
Station).) ...Respondent

Shri A.P.Mundargi, Sr. counsel with Shri Ganesh Gole
for the Applicant.

Shri Rajesh More, A.P.P for the Respondent.

CORAM : A. S. OKA, J.

DATE : OCTOBER 18, 2006.

JUDGMENT:

1. By this Revision Application under section 401 of the Code of Criminal Procedure, 1973 (hereinafter referred to as the said Code of 1973) the Applicant has challenged the Judgment and Order dated 30th May, 2006 passed by the learned 11th Ad hoc Additional Sessions Judge, Greater Mumbai at Sewree. The said order was passed on Application for discharge made by the Applicant. By the said order, the Application for discharge made by the Applicant has been rejected. The Applicant is being prosecuted for offences under

section 315, 318 read with section 34 of the Indian Penal Code.

2. The F.I.R was lodged by one Rajendrakumar Baviskar, Sub-inspector of Police who was at the relevant time posted at D.B.Marg Police Station, Mumbai.

3. On 13th January, 2003 one Maya Damodar Asolkar an adult unmarried woman gave a birth to a female child in Rajniben Arya Nursing Home situated at Opera House, Girgaon, Mumbai. The said Maya was staying with her relative Mrs Swati Ranjit Bandiwadekar. In the first week of January 2003, the said Mrs Swati became aware that the said Maya Asolkar was pregnant. Therefore, she took the said Maya to a family physician by name Dr. Avinash R. Rajan. After examining her, Dr. Rajan found that she was in advance stage of pregnancy. On his request, Dr. Tarulata Shah, a practising gynaecologist at Nagpada attended Dr. Rajan's Clinic on 11th January, 2003 and she examined the said Maya. The said Dr. Tarulata Shah advised Maya to get admitted in some maternity home. At that stage the said Mrs Swati suggested Rajniben Arya Nursing Home which was close to her residence.

4. Accordingly, on 13th January, 2003, the said Maya was admitted in the said nursing home. She was admitted under the care of Dr. Tarulata Shah. She delivered a female child at 10.30 p.m on the same day. The said Maya expressed desire to give the child to some adoption centre. On her instructions, Dr.Tarulata Shah contacted the Applicant. According to the case of the prosecution, as per the talk which took place between Dr. Tarulata and the Applicant on 14th January, 2003, on instructions of Dr. Tarulata Shah, infant was given in the custody of a staff member of Asha Nursing Home run by the Applicant.

5. On 17th January, 2003 the child became ill and therefore, Dr. J.K. Alam, a paediatrician was called to examine the child in the said Nursing Home. He prescribed some medicines. Ultimately, the child was admitted in Muslim Ambulance Nursing Home under the care of Dr. Alam. Despite of treatment given by Dr. Alam, the child died on 18th January, 2003 due to cardio respiratory failure at the said nursing home. A death certificate was issued by Dr. Alam and the body of the child was handed over to an attendant of Asha Nursing Home. The information of death was

communicated to Dr. Tarulata Shah who in turn informed the said Maya. As per the case of the prosecution, the Applicant made arrangements for the burial of the child and accordingly the child was buried at Worli Crematorium.

6. The F.I.R, as aforesaid was lodged against the Applicant and others. After completion of investigation, chargesheet was filed against the Applicant and Dr. Anup D. Arya who was the owner of the Rajniben Arya Nursing Home. By order dated 01st July, 2005 passed in Criminal Application No.3611 of 2005, this court quashed chargesheet in so far as Dr. Anup D. Arya is concerned.

7. To the Application for discharge made under section 227 of the said Code of 1973 by the Applicant, the learned Additional Public Prosecutor filed a reply. In the reply the Additional Public Prosecutor fairly stated that a perusal of F.I.R and all the statements recorded by the officer during the course of investigation shows that there is no evidence for charge under section 315 and 318 of the Indian Penal Code against the Applicant.

8. The learned senior counsel appearing for the Applicant invited my attention to the F.I.R and statements of all the witnesses recorded during the course of investigation which form part of the chargesheet. He submitted that though the learned Additional Public Prosecutor has fairly conceded before the Trial Court that there was no material against the Applicant, the learned Adhoc Additional Sessions Judge recorded a finding that there was a prima facie material for proceeding against the Applicant. He submitted that even taking statements of all witnesses as true, the case of offence under both sections is not at all made out. He submitted that the child was not born in the nursing home of the Applicant and secondly the child died in another nursing home. He submitted that a clear case for passing order of discharge was made out. Though the learned Additional Public Prosecutor did not dispute the contents of the reply filed by the Additional Public Prosecutor in the Trial Court, he submitted that no interference was called for.

9. I have considered the submissions. I have also perused all the statements of witnesses produced alongwith the chargesheet. As stated aforesaid F.I.R

was lodged by Shri Rajendra Baviskar, a Police Sub-inspector attached to D.B. Marg Police Station. He has alleged that though Asha Nursing Home was not having any adoption centre, the newly born child was brought to the said nursing home with the object of causing his death. The allegation is that the child was buried under a false name in Worli Crematorium with the object of intentionally concealing the birth of the child. In his statement, he has stated that the said Maya was admitted to Rajniben Arya Nursing Home under the care of Dr. Tarulata Shah and the child was delivered at the said nursing home. He has also stated that the said Maya and relatives instructed the Dr. Tarulata Shah to give the child to some adoption centre. After talking to the Applicant, Dr. Tarulata handed over the child to a staff member of Asha Nursing Home of the Applicant. In his statement he has stated that there was negligence on the part of the Applicant and staff members of Asha Nursing Home while taking proper care of the child and therefore, the Applicant is responsible for the death of the child. He alleged that an attempt was made by the Applicant to conceal the birth of the child.

10. One Smt Urmila Khorad who was at the relevant

time working as a nurse with Rajniben Hospital stated that she personally knew Dr. Tarulata who used to attend patients in said nursing home. She stated that as per telephonic instructions of Dr. Tarulata, the said Maya was admitted in nursing home after she signed necessary form. At the time of delivery of child, Dr.Tarulata Shah was present. She further stated that on 14th January, 2003 Dr. Tarulata Shah instructed the staff members that the child should be delivered in the custody of a representative of an institution dealing with adoptions and the said representative will give her reference. Accordingly, at 01.00 p.m in the afternoon, a woman by name Mohini came to Arya Nursing Home and gave a reference of Dr. Tarulata. The said witness stated that he contacted Dr. Tarulata Shah on telephone and informed her that one Mohini had come to the nursing home. On telephone Dr. Tarulata instructed her to handover child to the said Mohini. She stated that on 16th January, 2006 the said Maya was discharged from the hospital. The said statement of Urmila was recorded on 13th March, 2003. A supplementary statement was recorded on 17th April, 2003. In the said supplementary statement, she stated that the staff of Arya Nursing Home did not send intimation of birth of the child of Maya to Mumbai

Municipal Corporation.

11. The statement of the said Maya was recorded on 13th Mach, 2003. She stated that after Dr. Tarulata examined her she got admitted herself in Arya Nursing Home. He stated that she delivered a female child under the care of Dr. Tarulata Shah. She stated that she instructed Dr. Tarulata Shah that she wants to hand over the child to an adoption centre. She stated that Dr. Tarulata had tried to contact some adoption centers and ultimately Asha Nursing Home agreed to take the child and accordingly, the child was handed over to staff of Asha Nursing Home. She stated that three to four days after she was discharged from the hospital, Dr. Tarulata Shah informed her on phone that the child had died. She stated in her statement that she had no grievance against any one. Statement of Mrs Swati Bandiwadekar was recorded on 14th March, 2003. She has fully corroborated the version of Maya and stated that she had no grievance against any one.

12. Statement of Smt Swati Dattaram Yadav @ Geeta Sunil Gaikwad was recorded on 23rd April, 2003. She was working as a nurse at the relevant time in Dr.Rajniben Arya Hospital. She stated about the

delivery of the child by Maya. She stated that normally information regarding the birth and death of child is forwarded by the staff of the nursing home under the signature of Dr.Anup Arya to the Mumbai Municipal Corporation within eight days. However, the information regarding birth of child of Maya was never sent by the said nursing home and she was not aware about the reason for not sending the information. In the statement of one Smt Nilima Tukaram Gavanang, it was stated that she was also working as a nurse in Dr. Rajniben Hospital. She deposed about female child delivered by Maya and handing over of the child to one Mohini on instructions of Smt. Urmila Khorad. She also stated that information regarding birth of the child was not sent by nursing home to the Mumbai Municipal Corporation.

13. A statement of Smt Mohini was recorded in which she stated that the Applicant instructed her to bring a child from Rajniben Arya Hospital and by a taxi she brought the child to Asha Nursing Home. She stated that a nurse by the name Shamli took the child to Muslim Ambulance Nursing Home. She stated that on 18th January, 2003 she brought the body of the deceased child from the said nursing home to Asha Nursing Home.

Two supplementary statements of the said Mohini have been recorded. She stated that she handed over the body of the child to the Applicant. A statement of one Ms.Trupti Patil was recorded on 26th January, 2003. She was working as a nurse in the employment of the Applicant in Asha Nursing Home. She stated that on 18th January, 2003 body of dead child was brought by nurse Mohini to the Asha Nursing Home. She stated that destitute infants are being brought from time to time to Asha Nursing Home and the said infants are kept in a separate room. A supplementary statement was recorded on 11th June, 2003 of the same nurse in which she stated that the Applicant is not looking after the destitute infants properly and necessary equipment like caddle-warmer is not available in the maternity home.

14. The statement of one Kisan Sahu was recorded on 31st January, 2003 who was at the relevant time working as a driver with the Applicant. He stated that on 18th January, 2003 at 4.00 p.m the Applicant instructed him to take a dead body of a child for burial in Worli Crematorium. When he declined to do the work, the Applicant informed him that another person will accompany him in the car and he will do the needful. Accordingly, another person accompanied the said driver

who was carrying a dead body of a child in a bag alongwith the death certificate. They proceeded to Worli Crematorium in the taxi. In the crematorium they showed the certificate. He signed the register maintained in the said office. He stated that in a trench which was already there, the body of the child was buried. He stated that he deposited necessary fees and paid some amounts to the persons working there. He, however, threw away the bag in which dead body was carried. Next day in the morning, on the instructions of the Applicant he again went to the crematorium and brought the said bag by paying some cash amount to an employee working in the crematorium. He stated that afterwards he was told to proceed on leave and thereafter he took up employment with another person.

15. A statement of Dr. J.K. Alam was also recorded. He stated that he knew that the Applicant was having a trust which was taking destitute infants and children and was arranging to give the children in adoption. He stated that the Applicant used to call him for examining and treating infants. He stated that in case of necessity, the infants requiring hospitalisation were used to be admitted in the Muslim Ambulance Nursing Home under his care. He stated that

on 17th January, 2002 at 9.00 a.m the Applicant telephoned him and called him to examine a child who was sick. When he visited Asha Nursing Home and examine a male child, he was also told to examine a female child. In the afternoon he received a call from the Applicant and she informed him that the condition of the female child had deteriorated and therefore the child will be transferred to Muslim Ambulance Nursing Home. Accordingly, the child was admitted to the said Nursing Home. He stated that the child died on 18th January, 2003.

16. A further statement of Smt Urmila was recorded on 21st June, 2003 in which she clarified her earlier statements and stated about the bill prepared in the name of the patient Maya. There is also a statement of Dr.Tarulata Shah. She stated that after Maya expressed desire to give the child in adoption, she tried to contact Dr. Salgaonkar who was having an adoption centre at Dadar. As he was not available, she contacted the Applicant who was the mother of Dr. Mrs.Kiran Bijlani who was very well known to her. She stated that Dr. Kiran had informed her that her mother was running a adoption centre at Asha Nursing Home. She stated in her statement that after the child was

transferred to Asha Nursing Home, she received calls from Applicant on 15th January, 2003 and 17th January, 2003 informing her that the child was sick. On 18th January, 2003 she received a call from the Applicant informing about the death of the child. She stated that she accordingly informed Ms Maya and Mrs Swati about the death of the female child. The police also recorded statement of Dr. Avinash Rajan who had referred the said Maya to Dr. Tarulata. Further statement of Dr. J.K.Alam had recorded on 12th January, 2003 in which he stated that the Applicant was not having standard facilities in her maternity home like radiant warmer/cradle warmer (incubator) and other allied facilities. In the said statement, he disclosed that on 18th January, 2003 he issued death certificate in respect of female child describing cause of death as cardio respiratory arrest in a case of broncinia C AGE

C congenital breast disease.

17. Lastly, a statement of Shri Tanaji was recorded on 12th June, 2003 who was working as a death registration clerk. He stated that on 12th June, 2003 he showed the register to police from D.B. Marg Police Station and he showed entry dated 18th January, 2003 at serial No.135 regarding death of two days old baby who

was brought by one Kisan Sahu. He stated that necessary burial charges were accepted and receipt was issued. He stated that death report in usual format alongwith medical certificate submitted by the party was forwarded to the concerned office of Mumbai Municipal Corporation.

18. Assuming that all the said statements are true, it can be said that :

(a) on consent being granted by Maya, the Applicant received custody of female child from the Arya Nursing Home,

(b) as the female child developed sickness, the Applicant called Dr. J.K. Alam for examining the child,

(c) as the sickness was aggravated, the Applicant transferred the child to Muslim Ambulance Nursing Home,

(d) the Applicant took back dead body of the child and got the dead body buried in Worli Crematorium through her representative,

(e) necessary procedure was followed before the death body was buried in the sense that death certificate issued by Dr. Alam was submitted and necessary entry was made in the register maintained in the crematorium by paying necessary charges,

(f) all necessary facilities are not available in the maternity home of the Applicant,

(g) the infants received for adoption by the Applicant are not properly looked after by the Applicant,

The charge against the Applicant is under sections 315 and 318 of the Indian Penal Code. The said sections reads thus:

"**315. Act done with intent to prevent child born alive or to cause it to die after birth.-**Whoever before the birth of any child does any act with the intention of thereby preventing that child from being born alive or causing it to die after its birth, and

does by such act prevent that child from being born alive, or causes it to die after its birth, shall, if such act be not caused in good faith for the purpose of saving the life of the mother, be punished with imprisonment of either description for a term which may extend to ten years, or with fine, or with both.

381. Concealment of birth by secret disposal of dead body.-Whoever, by secretly burying or otherwise disposing of the death body of a child whether such child die before or after or during its birth, intentionally conceals or endeavours to conceal the birth of such child, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both".

19. It is not the allegation of the prosecution that any effort was made by the Applicant to prevent the child from being born. None of the witnesses have stated that the infant was not properly looked after or that any act was done by the Applicant with the

intention of causing the death of the infant. On the contrary the evidence is that since the child developed sickness, the Applicant called Dr. J.K. Alam for treating the child. The child was admitted to a nursing home under the case of Dr. Alam who is a paediatrician where the child died. Thus, none of the ingredients of section 315 are established. Section 318 will be attracted when dead body of a child is either secretly buried or otherwise is secretly disposed of with the intention of concealing or endeavouring to conceal the birth of such child. It is seen that in this case there was obviously no such intention as the Applicant had accepted the child in adoption centre for giving in adoption. The burial has taken place in a crematorium of the Mumbai Municipal Corporation after paying necessary fees and after producing the death certificate. So this is not a case where dead body of a child was secretly buried or otherwise disposed with the intention of concealing the birth. The Applicant was not responsible for entering the particulars of the birth in the record of the Municipal Corporation and that responsibility was of the nursing home where the child was born. Thus, none of the ingredients of section 318 are satisfied. Perhaps, this was the reason why the learned A.P.P made

a concession before the Trial Court. The learned Adhoc Additional Sessions Judge in the impugned order has made following observations in paragraph No.8, 10 and 11:

> "8. It would be convenient at this stage to refer section 315 of the Indian Penal Code, section 315 of the Indian Penal Code provides that "whoever before the birth of any child does any act with the intention of thereby preventing that child from being born alive, or causing it to die after its birth, and does by such act prevent that child from being born alive, or causes it to die after its birth, shall, if such act be not caused in good faith for the purpose of saving the life of the mother, be punished".
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> 10. In view of section 318 of the Indian Penal Code "whoever, by secretly burying or otherwise disposing of the dead body of a child, whether such child die before or after or during its birth, intentionally conceals or endeavours to conceal the birth of such child, shall be punished". Therefore, it cannot be

said that section 318 is not applicable to said case.

11. The next material aspect is that, the accused is involved in two other cases of similar nature i.e. Cr. No.11 of 2003, of J.J. Marg Police Station and Cr. No.27 of 2003, of Gaondevi Police Station. The learned senior counsel for accused has submitted that, the accused was discharged in Cr.No.18 of 2003. He has filed report of discharge. On persuing that report it appears that the accused was discharged due to report of DNA test but it does not mean that no any offence was made out. She was discharged on different points. On the basis of that discharge order, it cannot be presumed that, she has not committed the alleged offence".

It is obvious that the learned Judge has committed a complete error.

20. It is true that the material which is placed on record shows shocking state of affairs in our society. It is however for the authorities to take appropriate

steps in that behalf.

21. The law must take its own course. Even if it is assumed that whatever is stated in the statements of the witnesses is correct, case for commission of the offences under section 315 and 318 is not at all made out. Hence, this revision Application must succeed and I pass the following order:

(i) The Revision Application is allowed.

(ii) The impugned order dated 30th May, 2006 is quashed and set aside and Application at Exhibit 3 made by the Applicant is allowed.

(iii) The Applicant stands discharged for offences alleged under sections 315 and 318 of the Indian Penal Code in Sessions Case No.704 of 2005.

JUDGE